No. 12411

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

WALTER FRANCIS JOHN SHELLEY,
Petitioner,

vs.

RAILROAD RETIREMENT BOARD,
Respondent.

ON PETITION FOR REVIEW OF DECISION OF THE RAILROAD RETIREMENT BOARD.

BRIEF OF RESPONDENT

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JURISDICTION.

This proceeding seeks review of a decision of the Appeals Council of the Railroad Retirement Board, the Board being an independent agency in the executive branch of the United States government. Section 10(a) of the Railroad Retirement Act of 1937 (50 Stat. 314; 45 U. S. C., 1946 Ed., § 228j(a)). The decision of the Appeals Council

(Pet. R. 591, 592),[1] an intermediate appellate body of the Board, rendered on November 29, 1948, held that petitioner was not entitled to credit for service prior to January 1, 1937, toward an annuity under the Railroad Retirement Act of 1937 (50 Stat. 307, as amended by 60 Stat. 722; 45 U. S. C., 1946 Ed., §§ 228a-228s). Section 11 of the Railroad Retirement Act of 1937, as amended July 31, 1946 (50 Stat. 315, as amended by 60 Stat. 735; 45 U. S. C., 1946 Ed., § 228k) incorporates by reference the provisions of Section 5(f) of the Railroad Unemployment Insurance Act (52 Stat. 1100, as amended by 60 Stat. 738; 45 U. S. C., 1946 Ed., § 355(f)), which provides that any claimant aggrieved by *a decision of the Board* may obtain a review of the decision by filing a petition for review in the United States Court of Appeals for the Circuit in which he resides, for the Seventh Circuit, or for the District of Columbia. For the reasons set forth in Point I of the Argument, *infra*, the Court lacks jurisdiction, since the decision complained of is not a decision of the Board.

1. References in this form, Pet. R., are to the pages of the typewritten portions of the record designated by the petitioner.

STATEMENT OF CASE.

An individual age sixty-five is eligible for an annuity under the Railroad Retirement Act of 1937 if he was an "employee" on or after August 29, 1935, the "enactment date" as that term is used in the Act. Section 2(a) (45 U. S. C., 1946 Ed., § 228b(a)); Section 1(j) (45 U. S. C., 1946 Ed., § 228a(j)). An individual may, however, receive credit toward an annuity for service rendered before 1937 (the first year as of which taxes for railroad retirement purposes became payable)[2] only if he was an "employee" on August 29, 1935. Section 3(b)(1) and (2), (45 U. S. C., 1946 Ed., § 228c(b)(1) and (2)).[3]

This requirement of an "employee" status on August 29, 1935, in order to receive credit for service prior to 1937 is, so far as is here relevant, met only if the applicant was *on that date* in the active service of an "employer" (generally described as a railroad or railroad controlled company) or in an "employment relation" to an "employer." Section 1(b) and (c) (45 U. S. C., 1946 Ed., § 228a(b)(c)).[4]

2. A companion statute, the Railroad Retirement Tax Act (50 Stat. 435, as amended by 60 Stat. 722; 26 U. S. C., 1946 Ed., §§ 1500-1538), whose coverage provisions are identical with those of the Railroad Retirement Act, taxes employers and employees only with respect to compensation after 1936.

3. Section 3(b)(1) and (2) provide:

"The years of service of an individual shall be determined as follows: (1) In the case of an individual who was an employee on the enactment date, the years of service shall include all his service subsequent to December 31, 1936 and if the total number of such years is less than thirty, then the years of service shall also include his service prior to January 1, 1937, but not so as to make his total years of service exceed thirty. * * *

"In all other cases, years of service shall include only the service subsequent to December 31, 1936."

4. Section 1(b) provides: "The term 'employee' means (1) any individual in the service of one or more employers for compensation, (2) any individual who is in the employment relation to one or more employers, and (3) an employee representative * * *".

Section 1(c) provides: "An individual is in the service of an employer * * * if (i) he is subject to the continuing authority of the employer to

An individual is deemed to have an employment relation on August 29, 1935, if in six calendar months between that date and January 1946 he was in the active service of an employer. Section 1(d) (45 U. S. C., 1946 Ed., § 228a(d)).[5]

The question presented in the proceedings before the Appeals Council of the Board was whether the petitioner was entitled to credit toward an annuity for service prior to January 1, 1937 on the basis of having been in the service of an employer on or after August 29, 1935, with regard to his claimed service for the Southern Pacific Company on that date and during the latter part of 1935 and 1936 and the first quarter of 1937.

A. PROCEEDINGS UNDER THE RAILROAD RETIREMENT ACT PRIOR TO THE JULY 31, 1946 AMENDMENTS.

In a letter dated November 14, 1936, petitioner requested the Board to send him application forms, stating that he had worked for the Southern Pacific Company, and that "they turned me off in 1931, after promising me that when times improved, I would be re-employed and allowed all my seniority rights. This they have never done * * *"

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supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations and (ii) he renders such service for compensation * * *".

5. Section 1(d) provides: "An individual shall be deemed to have been in the employment relation to an employer on the enactment date if * * * (ii) he was in the service of an employer after the enactment date and before January 1946 in each of six calendar months, whether or not consecutive; * * *".

Prior to the 1946 amendments, an employment relation was defined in section 1(d) of Act (50 Stat. 308) as follows:

> "An individual is in the employment relation to an employer if he is on furlough, subject to call for service within or outside the United States and ready and willing to serve, or on leave of absence, or absent on account of sickness or disability, all in accordance with the established rules and practices in effect on the employer; * * *".

(App. 1).[6] On January 11, 1937, petitioner filed with the Board an application for annuity under the Railroad Retirement Act asserting that he was not then employed by a carrier and that he last worked for a carrier, the Southern Pacific Company, in 1932 (App. 3). He further stated in the application that the Southern Pacific Company promised that "when times got better I would be sent for. They never sent. They cancelled my annual pass, my insurance; and all my rights * * *" (App. 4). In reply to a Board questionnaire, petitioner, on February 9, 1937, again declared that he had not worked for a railroad since the fall of 1931 or 1932, and that he was on leave on and after August 29, 1935 because the Southern Pacific Company would not give him work (App. 4, 5). On November 22, 1937, the Southern Pacific Company reported that petitioner, as of August 29, 1935, was not on furlough, leave of absence, absent on account of sickness or disability, or subject to call for service. The company also stated that petitioner's "last compensated service [was] performed November 25, 1930" and that he "lost rights to return to service after being off six months" (App. 5, 6).

By letter of May 4, 1938 petitioner informed the Board that he had secured employment with the Virginia and Truckee Railway (App. 7, 8), and on June 23, 1938 he filed another application for an annuity under the Railroad Retirement Act claiming service with that railway from April to June 1938 (Pet. R. 35, 36). On September 30, 1939, the initial adjudicating unit of the Board, then known as the Division of Retirement Claims, rendered a decision awarding petitioner an annuity under the Railroad Retirement Act of 1937 in the sum of $.17 a month based on 2 months of service rendered by him for the Virginia and Truckee Railway prior to May 24, 1938, the date he at-

6. References in this form, App., are to the pages of the appendix to respondent's brief containing portions of the record designated by the respondent Board.

tained sixty-five years of age (Pet. R. 191). On November 8, 1939, petitioner's claim was, at his request, reopened for further investigation (App. 16). Additional information was secured from the Southern Pacific Company to the effect that petitioner was not in active service and did not have rights to return to service on August 29, 1935 (App. 18, 19, 20, 21). Petitioner was advised by Retirement Claims on January 2, 1940, that he was not entitled to an annuity based on service performed prior to January 1, 1937, and that he had a right to appeal such disallowance to the Appeals Council of the Board within one year (App. 23, 24).[7]

Disregarding such right to appeal, petitioner, on March 18, 1940, commenced an action in the United States District Court for the Southern District of California to compel the Board to grant him an annuity based on his service prior to January 1, 1937.[8] Upon motion of the Board, the court on September 30, 1940, dismissed the case "without prejudice to the filing of another action after plaintiff shall have exhausted his remedies before said Railroad Retirement Board."

Thereafter petitioner appealed to the Appeals Council of the Board (App. 24, 25) and on September 29, 1941, the Appeals Council sustained the decision of the Division of Retirement Claims (App. 26-35). Upon appeal to the Board itself, the Board on October 12, 1943, affirmed the decision of the Appeals Council and held that petitioner was not entitled to credit toward his annuity for service rendered prior to January 1, 1937, because his status as

7. Section 260.2(b) of the Board's Regulations (20 CFR 260.2(b)) then provided and still provides that appeals from initial decisions of the Bureau of Retirement Claims must be filed with the Appeals Council within one year from the date upon which notice of the initial decision was mailed to the applicant.

8. *Walter Francis John Shelley, complainant* v. *The Railroad Retirement Board, et al., defendants* (U. S. D. C., S. D. Cal., Central Div.), Civil Action No. 843-M.

an employee for the Southern Pacific Company terminated July 1, 1931, and he had no status as an employee with any other "employer" until April 1938 when he was employed by the Virginia and Truckee Railway (App. 39-59; Pet. R. 390, 391).

Almost a year after such decision by the Board, petitioner, on September 7, 1944, instituted another action against the Board in the United States District Court for the Southern District of California seeking to set aside the Board's decision on the ground that he possessed an employment relation on August 29, 1935, under the Act because he had on that date rights to return to the service of the Southern Pacific Company.[9] At a preliminary hearing in the case on November 20, 1945, petitioner for the first time raised the contention that he was in the active service of the Southern Pacific Company on and after August 29, 1935. When the action came up for trial on April 2, 1946, petitioner requested the court to dismiss the action, and stated that he would petition the Board to exercise its discretionary authority to reopen his case and consider his claimed service for the Southern Pacific Company on and after August 29, 1935. The court, on April 29, 1946, entered an order dismissing the action without prejudice to all parties concerned (Pet. R. 393, 402-407).

B. PROCEEDINGS AFTER THE JULY 31, 1946 AMENDMENTS TO THE RAILROAD RETIREMENT ACT.

Petitioner requested a reopening of the adjudication of his annuity and submitted depositions of several individuals in support of his claim that he was in the active service of the Southern Pacific Company on August 29, 1935, as well as during the months of September and October of that year (Pet. R. 394-400, 409-428). Petitioner later sub-

9. *Walter Francis J. Shelley, plaintiff* v. *Railroad Retirement Board, defendant* (U. S. D. C., S. D. Cal., Central Div.), Civil Action No. 3845-PH.

mitted additional statements and broadened his claim of actual service to the Southern Pacific Company to cover the entire latter half of 1935 and 1936 as well as the period from January to March 1937 (Pet. R. 430, 440, 441, 445, 509, 510, 570-572; App. 61-67, 75, 76). Petitioner's claim for an annuity was reopened by the Board's Bureau of Retirement Claims (App. 59, 60), and his contention that he was in the active service of the Southern Pacific Company on and after August 29, 1935, was examined in the light of the July 31, 1946 amendments to the Act which, as previously indicated (Footnote 5, *supra*), amended Section 1(d) of the Act so as to confer an employment relation upon an individual who performed actual service for an employer in six calendar months between August 29, 1935 and January 1946.

The personnel records of the Southern Pacific Company were exhaustively investigated, and the company completed and returned three separate questionnaires signed by responsible officials in which it reported that petitioner was not in its service during the periods claimed by petitioner on and after August 29, 1935 (App. 69-74, 79-81, 97-99). The company also furnished identifications of the individuals who, during these periods, occupied the positions in which petitioner claimed to have worked, and the petitioner's name was not included (Pet. R. 545, 546; App. 100). Petitioner having stated that he was paid for the claimed service by the Southern Pacific Company in the regular manner (Pet. R. 457-458; Petitioner's Brief, pp. 16-17), files and pay-roll records were especially checked by Mr. J. S. Cunningham, Secretary of the Board of Pensions, and Mr. H. R. Gernreich, Superintendent at Los Angeles, and both reported that the records failed to reveal the service claimed by petitioner on and after August 29, 1935, Mr. Gernreich stating that "there is nothing in our files to indicate that he [petitioner] per-

formed any service for this company after being cut off in November 1930'' (App. 96-100). A search of current wage reports filed by employers with the Board covering service after January 1, 1937, revealed three months of service performed for the Virginia and Truckee Railway from April to June, 1938, but no service for the Southern Pacific Company from January to March, 1937, as claimed (App. 77).

On the basis of all the evidence in the case the Bureau of Retirement Claims on August 29, 1947, found that petitioner was not eligible to receive credit for service performed prior to January 1, 1937, because he was not in the active service of an employer on August 29, 1935, and since he had not performed service for an employer in six calendar months between that date and January 1, 1946, he did not possess an employment relation to an employer on that date (App. 89-92). Petitioner was advised of his right to appeal to the Appeals Council and to appear before that body, copies of the appeal regulations being furnished on two occasions (App. 92, 93, 94). Petitioner appealed to the Appeals Council (Pet. R. 556, 572), and on November 29, 1948, the Appeals Council sustained the decision of the Bureau of Retirement Claims (Pet. R. 591, 592).

Ignoring his right to appeal to the Board itself, within the time and in the manner provided by the Board's Regulations,[10] petitioner instituted an action against the Board in the United States District Court for the Southern District of California to review the Appeals Council decision.[11] After advice from the General Counsel of the Board

10. Section 260.3(b) of the Board's Regulations (20 CFR 260.3(b)) provides that such appeal must be filed with the Board within four months from the date upon which notice of the decision by the Appeals Council is mailed to the applicant.

11. *Walter Francis John Shelley, plaintiff* v. *U. S. Railroad Retirement Board, defendant* (U. S. D. C., S. D. Cal., Central Div.), Civil Action No. 10,518-PH.

that jurisdiction to review Board decisions had been transferred from the United States District Courts to the United States Courts of Appeals by amendments to the Act of July 31, 1946, and also that petitioner had failed to exhaust his administrative remedies, petitioner on or about November 29, 1949, commenced this proceeding.

SUMMARY OF ARGUMENT.

I.

The Court lacks jurisdiction of this proceeding because of petitioner's failure to exhaust his administrative remedies before the respondent Board.

Section 11 of the Railroad Retirement Act, as amended in 1946, incorporates Section 5(f) of the Railroad Unemployment Insurance Act, as amended, and thereby specifically provides that judicial review may be obtained "only after all administrative remedies within the Board will have been availed of and exhausted." Moreover, Section 11 authorizes judicial review of "decisions of the Board" which includes only decisions rendered by the Board members as a Board. It is clear from Section 10 of the Railroad Retirement Act that Congress contemplated the establishment of an appellate procedure within the Board and did not intend the term "decisions of the Board" to cover decisions rendered by employees of the Board. By confining judicial review to decisions rendered by the Board itself, Congress assured expertness in judgment and uniformity of decision. The decision of which review is sought in this proceeding is a decision of the Appeals Council, an intermediate appellate body composed of employees of the Board. It is not a final decision of the Board itself. The four-month period within which such Appeals Council decision could be appealed to the Board has expired. The administrative remedy available to petitioner was adequate and the time allowed for taking an appeal to the Board was reasonable. Petitioner's contention that an appeal to the Board would be "useless" is not sufficient to excuse his failure to seek that relief. Peti-

tioner did not pursue his claim to a conclusion before the Board and therefore did not exhaust all administrative remedies available before the Board. Accordingly, the Court lacks jurisdiction of this proceeding.

II.

Even were the Appeals Council decision considered a decision of the Board, such decision should not be set aside since it is supported by the evidence and has a reasonable basis in law.

A. Decisions of the Board are not to be disturbed if they are supported by the evidence and have a reasonable basis in law.

Section 11 of the Railroad Retirement Act, as amended in 1946, incorporates Section 5(f) of the Railroad Unemployment Insurance Act as amended and thereby specifically provides that on judicial review "the findings of the [Railroad Retirement] Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive." The courts have held that these provisions, as well as earlier less restrictive provisions, limit judicial review and require that findings of the Board are not to be disturbed if supported by evidence.

B. The decision of the Appeals Council that petitioner was not on August 29, 1935 in the service of, or in an employment relation to an employer, and therefore was not entitled to credit for service prior to January 1, 1937, toward an annuity is supported by the evidence and has a reasonable basis in law.

The evidence of record amply supports the finding of the Appeals Council that petitioner was not in the active service of an "employer" on August 29, 1935, or in an employment relation to an employer on that date by reason of six months of active service between that date and Janu-

ary 1, 1946. Petitioner has established only three months of service, in 1938, with the Virginia and Truckee Railway. The record clearly shows that petitioner was not in the active compensated service of the Southern Pacific Company on or after August 29, 1935. The records of the railroad which were carefully checked, as well as the statements and actions of petitioner at the time he filed his application in 1937 and thereafter until the latter part of 1945, establish beyond question that petitioner last performed active service for the railroad prior to 1935. The depositions, affidavits and statements submitted by petitioner after 1945 to the effect that he performed active service for the company on and after August 29, 1935, are vague, indefinite and unreliable.

The weight to be accorded the evidence and the inferences to be drawn therefrom are matters to be determined by the Board. Even if conflicting inferences were possible, the Board's exercise of judgment should not be disturbed where it is shown to have a rational basis. In the instant case, it is clear that the decision of the Appeals Council of the Board is correct.

ARGUMENT.

I.

THE COURT LACKS JURISDICTION OF THIS PROCEEDING BECAUSE OF PETITIONER'S FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES BEFORE THE RESPONDENT BOARD.

It is a general rule that an individual may not appeal to a court from an administrative decision unless he has exhausted all the remedies available to him within the administrative agency. *Aircraft and Diesel Corp.* v. *Hirsh,* 331 U. S. 752 (1947); *Macauley* v. *Waterman S. S. Corp.,* 327 U. S. 540 (1946); *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41 (1938); *Red River Broadcasting Co.* v. *Federal Communications Commission,* 98 F. (2d) 282 (C. A. D. C. 1938), *cert. denied,* 305 U. S. 625 (1938); *La Verne Co-op. Citrus Ass'n* v. *United States,* 143 F. (2d) 415 (C. A. 9th, 1944); *Trans-Pacific Air Lines* v. *Hawaian Air Lines,* 174 F. (2d) 63 (C. A. 9th, 1949). The rule is succinctly stated by the Supreme Court of the United States in *Aircraft and Diesel Corp.* v. *Hirsch, supra,* at pp. 767-768, as follows:

> "* * * The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion, and correlatively, of awaiting their final outcome before seeking judicial intervention.
>
> "The very purpose of providing either an exclusive or an initial and preliminary determination is to secure the administrative judgment, either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken

initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the Congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination, at least of those things which Congress intended to and could commit to such agencies for final decision."

There can be no doubt that the rule applies to judicial review of proceedings before the Board. Section 11 of the Railroad Retirement Act of 1937, as amended July 31, 1946 (45 U. S. C., 1946 Ed., § 228k),[12] pursuant to which this proceeding is brought, incorporates the judicial review provisions of the Railroad Unemployment Insurance Act (Section 5(f) (45 U. S. C., 1946 Ed., § 355(f))) and thereby specifically provides that judicial review may be obtained in courts of appeals "only after all administrative remedies within the Board will have been availed of and exhausted."

Furthermore, only decisions of the Board itself are subject to judicial review. That the term "decisions of the Board" in Section 11 includes only decisions rendered by the members of the Board, as a Board, is shown by Section

12. Section 11 provides:
"Decisions of the Board determining the rights or liabilities of any person under this Act shall be subject to judicial review in the same manner, subject to the same limitations, and all provisions of law shall apply in the same manner as though the decision were a determination of corresponding rights or liabilities under the Railroad Unemployment Insurance Act except that the time within which proceedings for the review of a decision with respect to an annuity, pension, or lump-sum benefit may be commenced shall be one year after the decision will have been entered upon the records of the Board and communicated to the claimant."

10(b) 5 of the same Act (45 U. S. C., 1946 Ed., § 228j(b) 5) which immediately precedes Section 11 and provides:

> "The Board is authorized to delegate to any of its employees the power to make decisions on applications for annuities or death benefits in accordance with rules and regulations prescribed by the Board: *Provided, however,* That any person aggrieved by a decision so made shall have the right to appeal to the Board."

From this section it is clear that Congress contemplated the establishment of an appellate procedure within the Board and did not intend the term "decisions of the Board" contained in Section 11 to cover decisions rendered by employees of the Board. It drew a sharp distinction between decisions of the Board itself and decisions by employees of the Board and confined the judicial review provided by Section 11 to decisions rendered by the Board itself.[13]

Section 10(b) 5 was enacted to provide a method whereby the thousands of applications filed with the Board would first be sifted by employees of the Board so as to dispose of all cases except those which might be appealed to the Board; those cases which are appealed to the Board would again be sifted so as to reduce still further the number of cases which would be taken into court. Under this process, also, expertness in judgment and uniformity of decision are assured.[14]

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13. Additional support for the proposition that Congress meant to limit the phrase "decisions of the Board" to include only decisions rendered by the Board itself and not decisions of employees of the Board may be found in that part of Section 10(b) 4 (45 U. S. C., 1946 Ed., § 228j(b) 4) which reads as follows:

> "* * * Notice of a decision of the Board, *or of an employee thereof,* shall be communicated to the applicant in writing within thirty days after such decision shall have been made. * * *" (Emphasis supplied.)

14. Qualifications for membership on the Board specified by Section 10(a) of the Railroad Retirement Act (45 U. S. C., 1946 Ed., §228j(a)) insure that at least two of the three members of the Board shall have backgrounds of experience serving to familiarize them with the practices prevailing in the railroad industry. In addition, the Act requires that preference be given to persons with railroad experience in filling positions within the Board (Section 10(b) 4 (45 U. S. C., 1946 Ed., § 228j(b) (4)).

Accordingly, the Board has, by specific regulation, delegated to its employees power to make initial decisions upon applications for annuities (20 CFR 260.1) and has provided procedures within the Board by which appeals may be taken to an appellate body, also composed of employees of the Board, known as the Appeals Council (20 CFR 260.2). A decision of the Appeals Council may be appealed to the Board within four months from the date such decision is mailed to the applicant (20 CFR 260.3(a), (b)). Only when the Board has rendered a decision upon such appeal is there in existence a *decision of the Board* which can be reviewed by the courts.

Even before the amendments of July 31, 1946 to Section 11 of the Act (45 U. S. C., 1946 Ed., § 228k), which incorporated by reference the express condition imposed by Section 5(f) of the Railroad Unemployment Insurance Act (45 U. S. C., 1946 Ed., § 355(f)) that all administrative remedies within the Board be exhausted before judicial review may be obtained, the courts held that the decisions of the initial adjudicating unit and the intermediate appellate body established by the Board are not decisions of the Board itself and therefore are not reviewable. *Shaw* v. *Railroad Retirement Board,* 65 F. Supp. 73 (D. C., E. D. Wis., 1946); *Bruno* v. *Railroad Retirement Board,* 47 F. Supp. 3 (D. C., W. D. Pa., 1942); *Shelley* v. *Railroad Retirement Board* (D. C., Central Div. Cal., Civil Action No. 843-M, September 30, 1940). In *Shaw* v. *Railroad Retirement Board, supra,* the court, in dismissing the complaint, stated as follows (p. 75):

> "No 'action or decision of the Board' is here involved. The administrative process on plaintiff's application ended with the decision of the Appeals Council which, with the right of appeal to the Board being provided for, did not represent an 'action or decision of the Board.' Under Section 11, quoted above, it is obvious that a decision of the Appeals Council cannot

substitute for or be held as the equivalent of a decision of the Board itself. Until the Board has rendered a decision adverse to an applicant there is no basis under the law upon which the court's jurisdiction can rest. As the plaintiff failed to take an appeal to and secure a decision of the Board, he did not exhaust his administrative remedies, the prior exhaustion of which constitutes a condition precedent of lawful exercise of jurisdiction by this court, in cases under the Act."

The decision of which review is sought in this proceeding is a decision of the Appeals Council, the intermediate appellate body within the Board (Pet. R. 591, 592). It is not a final decision of the Board itself. The Appeals Council decision was mailed to petitioner on November 29, 1948 (App. 101). Petitioner filed no appeal from such decision to the Board, although he was fully informed of his right to file such an appeal.[15] The four-month period within which the Appeals Council decision could be appealed to the Board has expired (20 CFR 260.3(b)) and there is no right to further review of such decision by the Board (20 CFR 260.3(c)).[16] All the administrative remedies within the Board were not availed of and exhausted by petitioner before commencing this proceeding on or about November 29, 1949.

Since the administrative remedy available to petitioner was adequate and the time allowed for taking the appeal

15. On two occasions petitioner was furnished copies of the Board's Regulations governing appeals (App. 92, 93, 94). Such Regulations were, of course, published in the Federal Register (12 F. R. 1389-1390, as amended at 12 F. R. 1720). Moreover, in view of the dismissal of petitioner's first action against the Board (*Walter Francis John Shelley, complainant* v. *The Railroad Retirement Board, et al., defendants* (U. S. D. C., S. D. Cal., Central Div., Civil Action No. 843-M)) for failure to exhaust administrative remedies, it appears that petitioner was aware of the requirement that an appeal to the Board was necessary before judicial review could be granted.

16. Section 260.3(c) of the Board's Regulations (20 CFR 260.3(c)) provides as follows:

"The right to further review of a decision of the Appeals Council shall be forfeited unless formal final appeal is filed in the manner and within the time prescribed in this part."

to the Board was reasonable,[17] petitioner's failure to utilize fully the avenues of administrative review bars the judicial review sought in this proceeding; otherwise, a dissatisfied applicant could secure judicial review without exhausting his administrative remedies by the simple expedient of permitting the time for taking administrative appeal to the Board to lapse. *Yakus* v. *United States,* 321 U. S. 414 (1943); *First National Bank* v. *Weld County,* 264 U. S. 450 (1924); *McGregor* v. *Hogan,* 263 U. S. 234, 238 (1923); *Milheim* v. *Moffat Tunnel District,* 262 U. S. 710, 723 (1923); *Farncomb* v. *Denver,* 252 U. S. 7, 11 (1920); *Red River Broadcasting Co.* v. *Federal Communications Commission,* 98 F. (2d) 282, 287 (C. A. D. C., 1938), *cert. denied,* 305 U. S. 625 (1938).

In his petition for review, petitioner states that "after almost fourteen years of contest before said Board, and further contest being useless" he "regards his rights before the Board exhausted and asks for review of the entire matter."

At the outset it should be noted that the time lag between the filing of petitioner's application and the commencement of this proceeding was not occasioned by the Board. While it is true that the Board carefully and exhaustively considered petitioner's claim, allowing him unusual latitude, the undue delay charged by petitioner was caused primarily by his own action. In addition to submitting a large amount of irrelevant material, peti-

17. The four months allowed by the Board's Regulations for an appeal of an Appeals Council decision to the Board is clearly ample, particularly since the sole act necessary for taking such an appeal is the filing of an executed appeals form. Cf. *Yakus* v. *United States,* 321 U. S. 414 (1944) (60 days for protest of O. P. A. Administrators Regulations); *Farncomb* v. *Denver,* 252 U. S. 7 (1920) (60 days to appeal property assessments); *Sullivan* v. *United States,* 116 F. (2d) 576 (C. A. 6th, 1941) (60 days to appeal to Director of Veteran Affairs from War Insurance Council); *Red River Broadcasting Co.* v. *Federal Communications Commission,* 98 F. (2d) 282 (C. A., D. C., 1938), *cert. denied,* 305 U. S. 625 (1938) (20 days within which to petition for rehearing); 28 U. S. C. § 2107 (except as otherwise provided, 30 days to appeal civil suits from district court to court of appeals).

tioner also, as previously shown, interrupted the process of adjudication by premature court action.[18] Most important, however, is the fact that it was not until July 18, 1946, after dismissal of a second law suit,[19] that petitioner asked the Board to reopen his case upon the basis of his new contention that he was in the active service of the Southern Pacific Company on and after August 29, 1935 (Pet. R. 394-400). This contention was carefully investigated and expeditiously handled by the adjudicative units of the Board. After the Appeals Council decision was communicated to petitioner on November 29, 1948, petitioner did not appeal to the Board but permitted practically an entire year to lapse before commencing this proceeding on or about November 29, 1949. In any event, petitioner's belief that an appeal to the Board would be "useless" is not sufficient to excuse his failure to pursue that relief. *Red River Broadcasting Co.* v. *Federal Communications Commission*, 98 F. (2d) 282 (C. A., D. C., 1938), *cert. denied*, 305 U. S. 625 (1938). In that case the Court of Appeals, in dismissing a similar contention, stated as follows (p. 288):

> "Appellant seeks further to excuse its failure affirmatively to seek administrative relief, by contending that, even if it had attempted to do so, its request would have been denied; consequently, that its attempt would have been a futile and useless gesture. We cannot assume that consequence. If under such circumstances relief had been sought and denied, then there would have been a basis for appeal. As was said by the Supreme Court in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 616, 617, 57 S. Ct. 549, 553, 81 L. Ed. 835: 'One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal * * *. He should

18. *Walter Francis John Shelley, complainant* v. *The Railroad Retirement Board, et al., defendants* (U. S. D. C., S. D. Cal., Central Div.), Civil Action No. 843-M.

19. *Walter Francis J. Shelley, plaintiff* v. *Railroad Retirement Board, defendant* (U. S. D. C., S. D. Cal., Central Div.), Civil Action No. 3845-PH.

apply and see what happens.' See, also, *Goldsmith* v. *Board of Tax Appeals, supra.* So, in this case appellant should have sought its remedies and awaited the action of the Commission. It cannot be heard to complain in this court that there was danger of refusal when it made no effort to do so. See, also, *Bourjois* v. *Chapman,* 301 U. S. 183, 188, 57 S. Ct. 691, 694, 81 L. Ed. 1027; *Pacific Tel. & Tel. Co.* v. *Seattle,* 291 U. S. 300, 54 S. Ct. 383, 78 L. Ed. 810; *United States* v. *Illinois Central R. R. Co., supra; Lehon* v. *City of Atlanta,* 242 U. S. 53, 56, 37 S. Ct. 70, 61 L. Ed. 145; *Smith* v. *Cahoon,* 283 U. S. 553, 562, 51 S. Ct. 582, 585, 75 L. Ed. 1264; *Gundling* v. *Chicago,* 177 U. S. 183, 186, 20 S. Ct. 633, 44 L. Ed. 725.''

The Appeals Council decision of which review is sought in this proceeding was not appealed by the petitioner to the Board. Petitioner did not pursue his claim to a conclusion before the Board and therefore did not exhaust the administrative remedies available before the Board. Accordingly, the Court lacks jurisdiction of this proceeding. *Aircraft and Diesel Corp.* v. *Hirsch,* 331 U. S. 752 (1947).

II.

EVEN WERE THE APPEALS COUNCIL DECISION CONSIDERED A DECISION OF THE BOARD, SUCH DECISION SHOULD NOT BE SET ASIDE SINCE IT IS SUPPORTED BY THE EVIDENCE AND HAS A REASONABLE BASIS IN LAW.

A. Decisions of the respondent Board are not to be disturbed if they are supported by the evidence and have a reasonable basis in law.

Section 5(f) of the Railroad Unemployment Insurance Act (45 U. S. C., 1946 Ed., § 355(f)), incorporated into the judicial review provisions of Section 11 of the Railroad Retirement Act (45 U. S. C., 1946 Ed., § 228k), con-

tains a specific limitation upon the scope of review as follows:

> "The findings of the [Railroad Retirement] Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive."

In accordance with the plain meaning of this language, the courts have held that in reviewing Board decisions on claims for benefits, the findings of the Board are not to be disturbed if supported by the evidence and not based on an error of law. *Squires* v. *Railroad Retirement Board,* 161 F. (2d) 183 (C. A. 5th, 1947); *Barton* v. *Railroad Retirement Board,* 177 F. (2d) 710 (C. A. 3rd, 1949); *Monahan* v. *Railroad Retirement Board,* 181 F. (2d) 751 (C. A. 7th, 1950); *Dunne* v. *Railroad Retirement Board,* ..... F. (2d) ..... (C. A. 7th, decided June 5, 1950).

In the *Squires* case, the court stated (p. 183):

> "The decisions have long settled it that the case made before the Board is not retried. The decision of the Board is tried if it be in tune with fact and law, that is, if it finds support in the evidence and be not based on error of law. An examination of the record made before the Board and a testing of its decision under the applicable rule discloses a meticulous concern that petitioner's case be fully presented and fairly tried, findings based upon a most careful appraisement and weighing of the evidence, and supported thereby, and a decision in accordance with law. We are bound, therefore, under the statute which affords petitioner the review he seeks 'to enter upon the pleadings and transcript of the record a decree affirming the decision of the Board'."

In the *Dunne* case, the court's opinion stated:

> "The various units of the Board assisted petitioner in every possible manner in developing his claim. Every opportunity was afforded to present supporting evidence in his attempt to justify his right to an annuity as provided by the Retirement Act. Where

> the evidence in the record made before the Board supports the decision of the Board, as it does in this case, and the decision is not based on error of law our only course under the law and authorities is to affirm its decision."

It was well established even before the inclusion of the specific language quoted above in the Railroad Retirement Act that a decision of the Board on a claim for benefits is not a trial *de novo* and that such a decision is not to be set aside if it is supported by substantial evidence in the record before the Board, is not arbitrary or capricious, and has a reasonable basis in law. *South* v. *Railroad Retirement Board,* 131 F. (2d) 748 (C. A. 5th, 1942), *cert. denied,* 317 U. S. 701; *Gardner* v. *Railroad Retirement Board,* 148 F. (2d) 935 (C. A. 5th, 1945), *cert. denied,* 326 U. S. 783; *Ellers* v. *Railroad Retirement Board,* 132 F. (2d) 636 (C. A. 2nd, 1943); *Bruno* v. *Railroad Retirement Board,* 47 F. Supp. 3 (D. C., W. D. Pa., 1942).

B. The decision of the Appeals Council of the Board that petitioner was not on August 29, 1935 in the service of or in an employment relation to, an employer, and therefore was not entitled to credit for service prior to January 1, 1937, toward an annuity is supported by the evidence and has a reasonable basis in law.

The evidence of record amply supports the finding of the Appeals Council that petitioner was not in the active service of an "employer" on August 29, 1935, or in an employment relation to an employer on that date by reason of six months of active service between that date and January 1, 1946. Petitioner has established three months of service in April, May and June 1938 for the Virginia and Truckee Railway, an "employer," but he has failed to establish his claimed service for the Southern

Pacific Company on August 29, 1935, or during the latter part of 1935 and 1936 and the first quarter of 1937.[20]

The record before the Appeals Council clearly shows that petitioner was not in the active compensated service of the Southern Pacific Company on or after August 29, 1935. Petitioner never asserted a claim or presented any evidence to the Board to show that he was in the active service of the Southern Pacific Company on or after August 29, 1935, until July 18, 1946, when he filed his petition for a reopening of his claim following the dismissal of his second action in the District Court. During the very period in which petitioner later claimed to have performed service for the Southern Pacific Company, he requested the Board by letter dated November 14, 1936, to send him application forms and stated that the Southern Pacific Company had turned him "off in 1931, after promising me that when times improved, I would be re-employed and allowed all my seniority rights. This they have never done * * *" (App. 1). On January 11, 1937, petitioner filed with the Board an application for an annuity under the Railroad Retirement Act, asserting that he was not then employed by a carrier and that he last worked for a carrier, the Southern Pacific Company, in 1932 (App. 3). He further stated in such application that the Southern Pacific Company promised that "when times got better I would be sent for. They never sent. They cancelled my annual pass,[21] my insurance; and all my rights * * *" (App.

20. Apparently petitioner has now abandoned his claim that he rendered service after November 1935 for the Southern Pacific Company. See Petitioner's Brief, page 9.

21. On page 14 of petitioner's brief, he asserts that the fact that the Southern Pacific Company gave his wife an annual pass covering the period 1931 to 1933 shows that he worked for the company during that period, contrary to the company's records. It should be noted, however, that the pass was issued in 1931 while petitioner still held rights to return to service with the Southern Pacific Company, and it was cancelled on June 26, 1931, a few days prior to the termination of such rights on June 30, 1931 (App. 2-3).

4).[22] In reply to the Board's questionnaire, petitioner, on February 9, 1937, declared that he had not worked for a railroad since August 28, 1935, that he was on leave since that date because the Southern Pacific Company would not give him work, and that he last worked for a railroad or carrier in the fall of 1931 or 1932 (App. 4, 5). In a completed questionnaire dated November 22, 1937, the Southern Pacific Company reported that petitioner, as of August 29, 1935, was not on furlough, leave of absence, absent on account of sickness or disability, or subject to call for service. The company also stated that petitioner's "last compensated service [was] performed November 25, 1930" and that he "lost rights to return to service after being off six months" (App. 5, 6).

By letter dated May 4, 1938, petitioner informed the Board that he had secured employment with the Virginia and Truckee Railway (App. 7, 8), and on June 23, 1938, he filed another application for an annuity under the Railroad Retirement Act claiming service with that railway from April to June, 1938 (Pet. R. 35-40). In this application petitioner reiterated his statement that he was not in the active service of an employer on August 29, 1935, and asserted that he had been retired by the Southern Pacific Company about June, 1932 (Pet. R. 35). Again in a letter to the Board, dated November 5, 1938, petitioner stated: "after I was laid off in Oct., 1932, I made it my

22. In his brief (pp. 11, 17, 26), petitioner charges that the Southern Pacific Company has defrauded him of contract rights for a pension, and, in effect, that the Board has aided such a fraud by denying him an annuity under the Railroad Retirement Act based on all his railroad service. Any contract rights petitioner might have had for a private pension would, however, neither affect nor be affected by the Board's determination with respect to his eligibility for such an annuity under the Railroad Retirement Act, since such eligibility depends solely upon the provisions of the Act; indeed, Section 7 (45 U. S. C., 1946 Ed., § 228g) expressly states that the Act shall not "be taken as terminating any trust heretofore created for the payment of * * * pensions or gratuities." And any deductions that petitioner claims to have been made from his Southern Pacific salary in this connection could not possibly have been related to the taxes levied under the Railroad Retirement Tax Act (See Footnote 2, *supra*), since that Act became effective as of January 1, 1937.

business to regularly go around and try to get on, but my Foreman, Mr. B. J. Van Slyck, always advised me there was no work they could give me to do'' (App. 14). In response to a questionnaire, the Southern Pacific Company on December 12, 1939, advised (App. 18-20) that petitioner was separated from its service on November 25, 1930, for the reason that he was ''laid off account reduction in force, seniority rights to continue six months under agreement with the B of RC,'' explaining in greater detail as follows (App. 20):

> ''Mr. Shelley was not on the telegraphers' seniority roster at the time of his termination of service. In February, 1929 he transferred from the telegrapher-clerk seniority roster to the freight clerks' roster and placed on that roster effective July 1, 1929. On July 1, 1930, his name did not appear on the roster of the telegraphers. On July 1, 1931, his name was dropped from the freight clerks' roster account no service performed in past six months, this in accordance with clerks' agreement. * * * Therefore, Mr. Shelley's name did not appear on any seniority roster of this company on August 29, 1935.''

This information was corroborated by a letter of the local Chairman of the Order of Railroad Telegraphers, System Division No. 53, to Mr. D. J. Russell, Superintendent of the Southern Pacific Company, dated November 30, 1939, in which it is stated that petitioner's name did not appear on the telegraphers' seniority list issued July 1, 1930, although it had been shown on the list issued January 1, 1930 (App. 21).

In each of the steps subsequently taken by petitioner after he was advised by the initial adjudicating unit of the Board that he was not entitled to credit for service prior to January 1, 1937 (App. 23-24), namely, the first court action which was dismissed for failure to exhaust ad-

ministrative remedies,[23] the appeal to the Appeals Council which sustained the decision of the initial adjudicating unit (App. 24-25), the appeal to the Board which affirmed the decision of the Appeals Council (App. 39-59, especially at 42), and the commencement of the second law suit,[24] petitioner did not challenge the fact that he ceased active service for the Southern Pacific Company in 1930 and was not in the active service of that company on and after August 29, 1935, but claimed rather that he was on leave from and had rights to return to the service of that company on and after that date.[25]

It was not until July 18, 1946, when petitioner requested the Board to reopen his case, that petitioner first raised with the Board the new contention that he was in the active service of the Southern Pacific Company in the latter half of 1935 and 1936 as well as in the period from January to March, 1937 (Pet. R. 394-400, 409-428, 430, 440, 441, 445, 509, 510, 570-572; App. 61-67, 75, 76). The pay-roll and other compensation records of the Southern Pacific Company were exhaustively investigated and the company completed and returned three separate questionnaires signed by responsible officials in which it reported that petitioner was not in its service during the periods claimed by him on or after August 29, 1935 (App. 67-74, 78-81, 97-99). The

23. Complaint in *Walter Francis John Shelley, complainant* v. *Railroad Retirement Board, et al., defendants* (U. S. D. C., S. D. Cal., Central Div.), Civil Action No. 843-M.

24. Complaint in *Walter Francis J. Shelley, plaintiff* v. *Railroad Retirement Board, defendant* (U. S. D. C., S. D. Cal., Central Div.), Civil Action No. 3845-PH.

25. See also in this connection letter from petitioner to the Chairman of the Board dated September 29, 1942 (App. 38, 39) in which he stated the following:

> "During the great depression of 1932 and 1933 when the Company reduced its Staff, a great number of reductions were made in every department, and myself with others were laid off. * * *
>
> "Mr. T. H. Williams wrote me in 1932 that he would try and help me by appointing me to a position not covered by any Union Agreements, and he recommended that I keep on trying, and not attempt to have my Seniority as a Telegrapher changed from the O. R. T. Roster, and had he lived I know I would have received such an appointment. * * *"

company also furnished identifications of the individuals who, during these periods, occupied the positions in which petitioner claimed to have worked, and the petitioner's name was not included (Pet. R. 545, 546; App. 100). Although petitioner stated that he was paid by the company in the regular manner (Pet. R. 457-458; Petitioner's Brief, pp. 16-17),[26] the company's files and pay-roll records were especially checked by Mr. J. S. Cunningham, Secretary of the company's Board of Pensions, and Mr. H. R. Gernreich, Superintendent at Los Angeles, and both reported that the records failed to reveal the service claimed by petitioner on and after August 29, 1935, Mr. Gernreich stating that "there is nothing in our files to indicate that he [petitioner] performed any service for this company after being cut off in November, 1930" (App. 96, 100).[27]

26. Contrary to the assertion in petitioner's brief (pp. 16-17, 25) that the Board's inquiry as to the manner of payment for the claimed services was intended to excuse lack of company records or to suggest a factual situation precluding employee status, the inquiry obviously was intended to explore a possible ground for reconciling an actual performance of the claimed service with the absence of petitioner's name from the Company's detailed payroll records. In such case, if certain additional facts could have been shown, it might have been possible to find an employee status.

27. Petitioner's contention in his brief (pp. 10, 11, 13, 14, 15) that the Southern Pacific Company lacked records from which it could be determined whether he was employed on and after August 29, 1935, is without foundation. Petitioner erroneously assumes from a statement that check receipts were destroyed after six or seven years (Pet. R. 511, 546), that no records at all were kept by the Southern Pacific Company after such a lapse of time. This is not true. Only check receipts were not kept (Pet. R. 511, 546); pay-roll and other personnel records were retained by the company (App. 10, 11, 67-74, 78-80, 96, 97-99, 100; Pet. R. 545, 546). In fact, the regulations of the Interstate Commerce Commission require the company to retain pay rolls permanently. 49 CFR 111.1. Moreover, even such check receipts were in existence when information was obtained from the company in 1937 and 1938, only two and three years after August 29, 1935 (App. 5, 6, 10, 11). In this connection it should also be noted that petitioner confuses statements of various officials that records were not kept at their offices and referring petitioner to the proper record-keeping office as statements that the company had no records (Pet. R. 540, 563; App. 9, 10-11). Further, petitioner's claim in his brief (pp. 10, 13-14, 20) that inadequacy of company records is shown by the company's failure to verify some of his early service with it (1904-1905, 1918-1920), such service having been verified by the Post Master General, is clearly erroneous in the light of the company's full report of this service (App. 10-11) and the Post Office Department communication of May 9, 1938 (Pet. R. 47) which verified only service with that Department. There is not the slightest indication in the record that the Southern Pacific Company did not maintain adequate records from which it could be determined whether petitioner was in its active service on and after August 29, 1935 (App. 10, 11, 67-74, 78-80, 96-99, 100; Pet. R. 545, 546).

A search of the wage reports filed by employers with the Board revealed only three months of service subsequent to January 1, 1937, performed for the Virginia and Truckee Railway (App. 77).

It is clear from these facts and circumstances that there is sufficient evidence to support the finding that petitioner was not in the active compensated service of the Southern Pacific Company on and after August 29, 1935. Indeed, this is the only reasonable conclusion that could have been reached. The only evidence submitted by petitioner to establish his claimed service for the Southern Pacific Company on and after August 29, 1935, consists of depositions, affidavits and statements which are vague, indefinite and unreliable, and are not adequately supported by records, documents, or other sources which would enable the individuals to recall events occurring some ten years previously. For example, in connection with petitioner's claim of active service at Firestone Park Station from August 20, 1935 to September 9, 1935, the statements of Hurt (Pet. R. 415-418), Mahan (Pet. R. 421-423), Lynn (Pet. R. 440), Hansen (Pet. R. 441), Beck (Pet. R. 445, 509) and Krug (Pet. R. 510), do not assert that petitioner was at Firestone Park at any exact dates but state very indefinitely that it was in 1935.[28] Hansen who was a freight clerk at the Los Angeles Freight Station (Pet. R. 441), merely recalls "Mr. Shelley going to the Firestone Park Station in 1933, and again in 1934 and also in 1935," and Beck (Pet. R. 509) states he "remembers seeing Mr. Shelley apply, week after week and month after month in 1933, 1934 and 1935". Lynn (Pet. R. 440), Hansen (Pet. R. 441), Beck (Pet. R. 445), and Krug (Pet. R. 510) refer to Mr. Mahan as agent at Fire-

28. Hurt (Pet. R. 418): "It would be in 1935."
Mahan (Pet. R. 422-423): "in 1933 and once or twice * * * in 1934 and 1935. That is all I remember."
Lynn (Pet. R. 440): "The following year, 1935."
Hansen (Pet. R. 441): "also in 1935."
Beck (Pet. R. 445): "In the year 1935." (See also R. 509.)
Krug (Pet. R. 510): "Also in 1935 at Firestone."

stone Park Station, although the company reported that during the months of August and September, Firestone Park Station was under the jurisdiction of the Los Angeles agent and the position was filled by Mr. R. Riggs (App. 100).

With respect to the deposition of Sims (Pet. R. 410-413), who stated that he was relieved by petitioner at Santa Susana for about three weeks commencing "just about September 10, 1935," it should be noted that the company reported that its records show that Mr. Sims filled the position at Santa Susana during the entire month of September, the company further stating that petitioner did not perform any service for it after November 1930 (App. 100).[29] The company's report likewise contradicts the affidavit of Finlay that he saw petitioner at Santa Susana (Pet. R. 570-572). Moreover, Finlay was not an employee of the Southern Pacific Company; according to his statement, he merely visited Shelley in a few instances on personal business; his statements are not adequately supported, and his assertion that he saw Shelley working at Santa Susana on September 28, 1935, conflicts with petitioner's statement that he ceased service at Santa Susana on September 25, 1935 (Pet. R. 571-572; App. 65). Finally, the Fansler deposition (R. 426-427) is likewise indefinite concerning the service claimed to have been performed at Ventura, stating it was performed "about October 1935."

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29. Some indication of the vague character of Mr. Sims' testimony and his susceptibility to suggestion is revealed by the following excerpt from his deposition (Pet. R. 411-413):

"Q. Did you ever hear where Mr. Shelley came from and had been working before he came to Santa Susana?

A. I understand he came from Firestone Park where he had been relieving the Agent and Night Clerk before he came to Santa Susana.

* * * * *

Q. Do you remember where he went from there after he left you—or did you hear where he went?

A. I don't believe I heard. Did you tell me where you went?

Q. Yes, I told you I went to Ventura and relieved the agent there.

A. I forgot that.

Q. What was your answer to that question?

A. Well, of course you told me that you went to Ventura, but I had forgot."

The depositions, affidavits and statements submitted by petitioner are completely contradicted by his own statements and contention before the Board and the courts until November 1945 that he had been separated from the service of the Southern Pacific Company and was on leave from that company on and after August 29, 1935 (App. 1, 2, 3, 4, 5, 7, 8, 14-15, 24-26, 38-39; Pet. R. 35; Footnotes 23 and 24). Some of these statements were made by petitioner in 1936 and 1937 immediately after and during part of the time he later claimed he performed active service for the Southern Pacific Company (App. 1, 2, 3, 4, 5, 75-76). If petitioner did perform active service for the Southern Pacific Company on and after August 29, 1935, as claimed, there would have been no reason for his ineffectual attempt, by seeking and accepting short-term employment with the Virginia and Truckee Railway in 1938, to qualify for an annuity based on all his railroad service (App. 6, 7, 8). In addition, it is extremely unlikely that petitioner could have performed service for the Southern Pacific Company in 1933, 1934 and 1935, as alleged in the depositions, affidavits and statements submitted by petitioner, without the company having knowledge or trace of at least some such service. When petitioner's own prior statements and actions are considered together with the record information furnished by the Southern Pacific Company, the conclusion is inescapable that petitioner was separated from the active service of the Southern Pacific Company prior to 1935 and was not in the active service of that company on or after August 29, 1935.

Since the depositions, affidavits and statements submitted by petitioner were executed more than ten years after the service is claimed to have been performed, it is understandable that the memories of the individuals making such depositions, affidavits and statements would be quite faulty, and the fact that the petitioner merely ap-

plied for work many years ago may be converted into a present belief that petitioner was then actually working for the company.[30]

The weight to be accorded the evidence submitted in this case as well as the inferences to be drawn therefrom are matters within the province of the Board; even if conflicting inferences were possible, the Board's exercise of judgment should not be disturbed where it is shown to have a rational basis. *Ellers* v. *Railroad Retirement Board,* 132 F. (2d) 636 (C. A. 2nd, 1943); *Watts* v. *Railroad Retirement Board,* 150 F. (2d) 113 (C. A. 5th, 1945). In the *Ellers* case, the court stated (pp. 639-640):

> "The district judge * * * apparently came to the conclusion that the evidence relied on by the Board in support of its decision was unsubstantial because it consisted of reports, answers to questionnaires and letters none of which was under oath, whereas Ellers' principal evidence consisted of Nolan's and his own affidavits. In drawing a distinction between sworn and unsworn evidence and ascribing controlling weight to the former we think the court was in error.
>
> "Administrative agencies are usually not restricted to the same rules of evidence as apply in court proceedings, even in the absence of an express statutory provision on the subject. See *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 443, 50 S. Ct. 220, 74 L. Ed. 524; *John Bene & Sons* v. *Fed. Trade Commission,* 2 Cir., 299 F. 468, 471; Evidence in the Administrative Process, 55 Harv. L. Rev. 365, 379. While the Board is given power to compel the attendance of witnesses, administer oaths and take testimony, 45 U. S. C. A. § 228j(b)4, its administration of the Acts is not confined to information obtained by testimony. The same section authorizes it to 'make all necessary investigations in any matter involving annuities or other payments'; and to 'require all employers and

30. The authorities cited by petitioner on page 24 of his brief not only fail to support his contention as to the credibility of the depositions, affidavits and statements furnished by him, but, on the contrary, indicate that such evidence is not reliable.

employees * * * to furnish such information and records as shall be necessary for the administration' of the Acts. If an employer wilfully refuses to make a report or knowingly reports false information he is subjected to severe criminal penalties by § 13 of the Act, 45 U. S. C. A. § 228m. It is clear, therefore, that in adjudicating claims for annuities the Board is permitted to consider evidence which would be objectionable in a court of law, and if it is of a kind on which fair-minded men are accustomed to rely in serious matters, it can support an administrative finding. See *National Labor Relations Board* v. *Remington Rand,* 2 Cir., 94 F. 2d 862, 873. The evidence received was of this character. The weight to be accorded it was for the Board to determine. Even when a court upon a consideration of all the evidence might reach a different conclusion, it may not substitute its own for the administrative judgment. See *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304, 57 S. Ct. 478, 81 L. Ed. 659; *Holloway* v. *Railroad Retirement Board,* D. C. N. D. Ga., 44 F. Supp. 59, 62. Rejecting, as we do, the theory that statements in affidavits must necessarily prevail over unsworn reports by officers of the railroad or agents of the Board we are satisfied that the Board's decision finds substantial support in the evidence and was not arbitrary or capricious."

Similarly in the *Watts* case, *supra,* the court said (p. 115):

"A careful study of the record here leaves us in no doubt that this is peculiarly a fact case, and that it was peculiarly for the Board to say whether the inference to be drawn from the testimony as a whole was that plaintiff was, or that he was not, totally and permanently disabled. The district court was, therefore, right in declining to set aside or otherwise interfere with the Board's findings and decision."

It is clear from the foregoing that the finding that petitioner was not in the active service of an employer on August 29, 1935, and did not perform service for an em-

ployer in six calendar months between that date and January 1, 1946, is amply supported by the evidence. It follows that he was not an employee on August 29, 1935, and is not entitled to credit for service prior to January 1, 1937, toward an annuity.

CONCLUSION.

For the reasons set forth above, respondent respectfully submits that the petition in this proceeding should be dismissed and judgment entered in its favor.

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